UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

MHA, LLC d/b/a MEADOWLANDS HOSPITAL MEDICAL CENTER, Respondent, -and- HEALTH PROFESSIONAL AND ALLIED EMPLOYEES, AFT/AFL-CIO, Union.	Case Nos. 22-CA-086823 22-CA-089716 22-CA-090437 22-CA-091025 22-CA-091521 22-CA-092061 22-CA-096650 22-CA-097214 22-CA-099492 22-CA-100324 22-CA-106694

RESPONDENT'S ANSWERING BRIEF TO THE UNION'S EXCEPTIONS TO THE DECISION AND RECOMMENDED ORDER OF THE ADMINISTRATIVE LAW JUDGE

I. INTRODUCTION.

Respondent MHA, LLC d/b/a Meadowlands Hospital Medical Center ("Respondent") submits this Answering Brief to the Health Professionals & Allied Employees, AFT/AFL-CIO ("Union") Exceptions to the September 20, 2016 Decision and Recommended Order of Administrative Law Judge Steven Davis ("ALJ"). The Union excepts to the following:

(1) The ALJ's finding that Respondent did not violate Section 8(a)(1) of the Act with respect to Dr. Richard Lipsky's statement to Union officials on April 3, 2013 (D. 7-8) (U. Br. 5-11);

(2) The ALJ's alleged failure to conform his Conclusions of Law, Remedy, Recommended Order, and Appendix to the findings in his Decision with respect to Respondent's implementation of new employee medical plans (D. 138-146) (U. Br. 11-15); and

(3) The ALJ's alleged failure to conform his Conclusions of Law, Remedy, Recommended Order, and Appendix to the findings in his Decision with respect to the Section 8(d) allegations (D. 138-146) (U. Br. 15-18).

For the reasons set forth below, Respondent respectfully requests the Board dismiss the Union's Exceptions and affirm the ALJ's findings, conclusions and recommended order pertaining to those allegations.[1]

[1] References to the ALJ's Decision and Order are noted herein as "(D. __)". References to the Union's Brief In Support of Exceptions are noted herein as "(U. Br. __)".

II. ARGUMENT.

A. The ALJ Properly Concluded That Respondent Did Not Violate Section 8(a)(1) With Respect To Dr. Lipsky's April 3, 2013 Statement to Union Officials (Union Exception 1).

The General Counsel alleged that Respondent, through Dr. Lipsky, violated Section 8(a)(1) by threatening not to reach an agreement with the Union unless the Union ceased its negative and disparaging publicity campaign against the Hospital. (D. 7:19-20). On April 3, 2013, the Respondent and the Union attended a meeting at the Department of Health at Respondent's request in an attempt to resolve the differences between them. (D. 7:21-23). In attendance were Dr. Lipsky, Tamara Dunaev, Ann Towmey, Union President, and Carlton Levine, Union representative, among others. (D. 7:23-24). According to the General Counsel, Dr. Lipsky stated that "if [the Union] does not cease the media campaign we will never come to any agreement. Every issue will have to go to the NLRB." (D. 7:40-43).

The ALJ correctly dismissed the 8(a)(1) allegation, concluding that "there [was] no evidence that employees were present at the meeting when Dr. Lipsky made his comment[,] . . . or was there evidence that his comment was disseminated to employees." (D. 8:14-16). As explained below, the ALJ's conclusion is supported by well-settled Board law.

i. The ALJ's Reliance On *Branch International Services* Is Proper And Mandates Denial Of The Exception.

The Union argues that the ALJ improperly relied upon the Board decision in Branch International Services, 310 NLRB 1092 (1993) in dismissing the allegation. (U. Br. 7-11). The Union maintains that Branch International Services, 310 NLRB 1092 (1993) is factually distinguishable as the Board's rationale for dismissing the 8(a)(1) allegation was limited to the "type of activity" alleged in the complaint – assisting a local union. The Union's argument is without merit.

In Branch International Services, the allegation concerned an employer's statement to a Union organizer and Union President to the effect that it would assist them in representing its employees. Id. at 1106. The Board affirmed the ALJ's decision dismissing the Section 8(a)(1) allegation, reasoning that the allegedly unlawful conversation "never reached the ears of the employees." Id. The Board explained that while the statement may have been unlawful if uttered to employees, "there is no suggestion that any 'employee' heard the [statement] and there is certainly no proof that the unit employees were ever aware of this conversation or that Earhart or the Teamsters Union ever acted on the [statement]." Id. Here, as in Branch International Services, Dr. Lipsky's purported statement was made to Union officials in a closed meeting, and thus, "never reached the ears of the employees." 310 NLRB at 1106. Further, there was no evidence showing that the statement was ever disseminated to employees. (D. 8:14-16). As such, the ALJ properly relied upon the Board's holding in Branch International Services in dismissing the allegation.

Contrary to the Union's argument, the Board in Branch International Services did not limit its holding to the "type of activity" (i.e. assistance to a rival union) alleged in the underlying complaint. The Board focused on the audience and evidence of dissemination to employees. Id. In fact, the Union conveniently omits the fact that the Board has applied this legal principle in all matters involving isolated statements or "threats" to union representatives regardless of the "type of activity" alleged in the underlying complaint. For example, in Fifteen Avenue Ironworks, 279 NLRB 643 (1986), the Board affirmed ALJ Steven Davis' dismissal of a Section 8(a)(1) allegation as the alleged threat to a Union official was made in Italian. Id. at 654-55. In doing so, ALJ Davis explained that "[t]here was no showing that any of the employees who were present understood Italian or were told by Schifano what Pat Degliuomini said to him." Id. at 654 ("In order to determine whether certain action 'reasonably tends to restrain, coerce or interfere with' employees Section 7 rights, ***the employees must be aware of the***

allegedly unlawful conduct.") (emphasis added); Kopp Evans Construction, 143 NLRB 690, 693 (1963) ([s]tatements which would have been coercive if made to employees were not coercive when made only to union representatives.") (citing Max Silver & Sons, 123 NLRB 269 (1959) and Reilly Cartage Company, 110 NLRB 1742 (1954)); see also Valley Hospital, Ltd., 222 NLRB 623, 625 (1976) (a statement uttered to union representatives "which *might* have tended to create an impression of surveillance, would have to be communicated to the employees of this respondent before there could be a possible violation of Section 8(a)(1) of the Act."); Covington Motor Co., Inc., 146 NLRB 32, 37 n. 8 (1964) ("Respondent did not violate Section 8(a)(1) when Earl Bailey stated that the Company would close its service department before it would recognize the Union, since this remark was made only to Harry Scott, a union representative, at a time when no employees were present."). In all of these cases, the Board's focus was on the recipients of the statement and any evidence of dissemination to employees – not the "type of activity alleged." (U. Br. 7).

Accordingly, the ALJ correctly found Dr. Lipsky's statement did not violate Section 8(a)(1). (D. 8:14-16).

ii. The Board Decisions Cited By The Union Are Distinguishable.

The Union argues that "employee knowledge of the employer's conduct is not an indispensable element of an unfair labor practice finding." (U. Br. 7). The Union's reliance on U.S. Serv. Indus., Inc., 324 NLRB 834 (1997) is misplaced. In U.S. Serv. Indus., Inc., the complaint alleged that an employee was constructively discharged as a result of his union activities in violation of Sections 8(a)(3) and (1) of the Act. During the hearing, the union sought to amend the complaint "to allege that on or about August 11 and 14, 1995, the Respondent issued written warnings to Ricardo Ortiz, in violation of Section 8(a)(3) and (1) of the Act." Id. at 835. The ALJ denied the motion as there was no evidence showing the employee was aware of the written warnings at the time of his resignation. The Board reversed the ALJ's

decision, finding the proposed amendment sufficiently pled and closely related to the initially asserted allegations. In doing so, the Board generally noted that "employee knowledge of the employer's conduct is not an indispensable element of an unfair labor practice finding." Id.

The Union, however, incorrectly extends the Board's holding in this respect. The Board's pronouncement pertained to the actual issuance of the written warnings as opposed to a threat uttered to a Union official. In this matter, there is no record evidence that Respondent actually refused to process all grievances or engage in bargaining. In fact, the record establishes the opposite. The parties have processed more than forty-four grievances. (GC66). There is no allegation or evidence that Respondent has not or would not process the grievances through to arbitration or resolution. The Union's inability to point to any record evidence of adverse action in conjunction with Dr. Lipsky's April 3, 2013 statement is fatal and completely renders the Board's holding in U.S. Serv. Indus., Inc. inapplicable.

The Union argues in the alternative "employees could reasonably be expected to become aware" of Dr. Lipsky's statement. The Union's argument once again misses the mark. Significantly, "[t]he Board has held that it is not reasonable to assume a statement made by an employer to a union representative would be repeated by the union representative to the employee." NLRB v. Selwyn Shoe Manufacturing Corp., 428 F.2d 217, 219 (8th Cir. 1970) (citing Kopp Evans Construction, 143 NLRB 690 (1963) (emphasis added)); Crown Bolt, Inc., 343 NLRB 776 (2004).

Furthermore, the decisions cited by the Union are factually distinguishable. In H.R. McBride, 122 NLRB 1634 (1959), the Board, agreeing with the Trial Examiner, found that the employer violated Section 8(a)(1) based on an assault "which was witnessed by employees of the Respondent" as well as other assaults not witnessed by employees. The Board noted that in light of the assault witnessed by the employees on October 30, "the relatively small size of the project and community where they occurred and their proximity in time to the assault of October

30, that the Respondent's employees could reasonably be expected to become aware of them." Id. at 1635. Similarly, in Precision Concrete, 337 NLRB 211 (2001), the employer's statement to the Union organizer during a strike was, in fact, "repeated by [the Union organizer] to strikers at the next union meeting, a few days [later] . . . ." Id. at 224. In light of the ongoing strike and consequent union meetings, the Board found that "it was reasonably foreseeable for [the employer] to know and perhaps expect that during the strike, [the Union organizer] would relate Stewart's remarks to striking employees ***which he did***." Id. (emphasis added).

Here, in contrast to the findings in H.R. McBride, the Union has not identified alleged threats uttered by Dr. Lipsky which were witnessed or heard by the employees in close proximity to the April 3, 2013 statement such that "Respondent's employees could reasonably be expected to become aware of [it]." Id. There also is no record evidence of an ongoing strike or union meetings with Union representatives for which Dr. Lipsky could "reasonably foresee" the alleged statement would be relayed to unit employees as in Precision Concrete.

Lastly, the Union argues that some forms of employer misconduct are "so inherently damaging to Section 7 rights that the actions will violate the Act even if employees are unaware of them[,]" such as individual arbitration agreements and employee surveillance. (U. Br. 7-8). There is no reasonable basis upon which to conclude that Dr. Lipsky's isolated statement to Union representatives at a settlement conference rises to the misconduct inherently damaging to Section 7 rights.

Therefore, the Union's reliance on Anchor Rome Mills, Inc., 86 NLRB 1120 (1949) in support of its assertion is misplaced. (U. Br. 10). In Anchor Rome Mills, Inc., the employer procured pistol licenses for its supervisors and non-striking employees shortly before and during the strike "to furnish the means of intimidating and coercing strikers in the exercise of their right to engage in concerted activities." Id. at 1123. The Board noted that it was irrelevant whether the employees were aware of the employer's part in procuring the pistol licenses,

explaining that "the normal consequence of conduct such as that engaged in by the Respondent in obtaining pistol licenses for management officials, supervisors, and non-strikers, is the abandonment of orderly and peaceful procedures for the settlement of industrial disputes, and resort to armed conflict such as did here, in fact, ensue." Id.

Here, Dr. Lipsky's statement to Union representatives in a closed meeting falls woefully short of the procurement of pistol licenses to management officials, employee surveillance and individual arbitration agreements. Unlike the employees in Anchor Rome Mills, Inc., who witnessed the management officials carrying pistols in the workplace during a strike, the Hospital employees in this matter had absolutely no knowledge of Dr. Lipsky's alleged statement to the Union representatives.

B. The Union's Request to Supplement The ALJ's Decision Should Be Denied (Union Exceptions 2-3).

The Union's exceptions seek to expand upon the ALJ's Decision by requesting the Board include a statement about ALJ's finding of a violation in regard to the Respondent's implementation of a new employee medical plan. (U. Br. 11-15). First, per Respondent's exceptions, the ALJ erred in finding Respondent's implementation of a new employee medical plan violated the Act as it was a substantially comparable medical plan. Therefore, no violation can be established, and the Union's request is moot. Secondly, the Union's request to add a remedy for the finding is in fact, a request for a substantive change. The request assumes that ALJ's inadvertence. However, give that there was no evidence of any adverse effect on any employee leads to the conclusion that the ALJ's omission was no inadvertent. The Union's request must be denied.

The Union also seeks a finding that Respondent's aggrieved conduct in this matter violated Section 8(d) of the Act. (U. Br. 15-18). As stated in Respondent's exceptions, Respondent possessed a "sound arguable basis" for believing it had the unilateral right to take

such actions under the express contract language. Thus, no 8(d) violations can be established, and the Union's request is moot. Further as with the medical plan allegation, the Union's request for a substantive change assumes facts not in the record.

The Union's request to add additional language to the ALJ's Conclusions of Law, Remedy, Recommended Order, and Appendix should be disregarded as the ALJ's decision is complete and proper.

III. CONCLUSION.

For all the reasons stated above, Respondent respectfully requests the Board dismiss the Union's Exceptions and affirm the ALJ's findings, conclusions and recommended order relating to those issues addressed by the Union its Exceptions.

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Dated: February 10, 2017

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CERTIFICATE OF SERVICE

The undersigned affirms that on February 10, 2017, Respondent's Answering Brief to the Union's Exceptions to Administrative Law Judge Steven Davis' Decision and its Brief in Support of Exceptions were filed with the National Labor Relations Board using the e-filing system at www.nlrb.gov, and that copies were served on the following individuals by electronic mail:

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